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***Via Certified Mail - Return Receipt Requested***

January 23, 2013

Miles P. Moore  
Environmental, Health, and Safety Manager  
Blommer Chocolate Company  
1515 Pacific Street  
Union City, CA 94587

Peter Blommer  
President and Chief Operating Officer  
Blommer Chocolate Company  
600 West Kinzie Street  
Chicago, IL 60610

***Re: Notice of Violations and Intent to File Suit Under the Clean Water Act***

Dear Owners, Operators and/or Site Managers:

## **NOTICE**

The Clean Water Act ("CWA" or the "Act") §505(b), 33 U.S.C. §1365(b), requires that sixty (60) days prior to the initiation of a civil action under CWA §505(a), 33 U.S.C. §1365(a), a citizen must give notice of intent to sue to the alleged violator, the Environmental Protection Agency ("EPA") and the State in which the alleged violations occur.

Northern California River Watch ("River Watch") hereby places Blommer Chocolate Company hereinafter referred to as "the Discharger" on notice, that following the expiration of 60 days from the date of this Notice, River Watch intends to bring suit in the United States District Court against the Discharger for continuing violations of an effluent standard or limitation, permit condition or requirement, a Federal or State Order or Plan issued under the CWA, in particular, but not limited to CWA §505(a)(1), 33 U.S.C. §1365(a)(1), the Code of Federal Regulations and the Regional Water Quality Control Board - North Coast Region, Region Water Quality Control Plan ("Basin Plan").

The CWA regulates the discharge of pollutants into navigable waters, including the discharge of pollutants through stormwater. The statute is structured in such a way that all discharges of pollutants are prohibited with the exception of enumerated statutory provisions. One such exception authorizes a polluter, who has been issued a permit pursuant to CWA §402, 33 U.S.C. §1342, to discharge designated pollutants at certain levels subject to certain conditions. The effluent discharge standards and limitations specified in a National Pollution Discharge Elimination System ("NPDES") Permit define the scope of the authorized exception to the 33 U.S.C. §1311(a) prohibition, such that the violation of a permit limit places a polluter in violation of 33 U.S.C. §1311(a), and thus in violation of the CWA. Private parties may bring citizens' suits pursuant to 33 U.S.C. §1365 to enforce effluent standards or limitations, including violations of 33 U.S.C. §1311(a), 33 U.S.C. §1342(p), and 33 U.S.C. §1365(f)(1).

The CWA provides that authority to administer the NPDES permitting system in any given state or region can be delegated by the EPA to a state or regional regulatory agency, provided that the applicable state or regional regulatory scheme under which the agency operates satisfies certain criteria. *See* 33 U.S.C. §1342(b). In California, the EPA has granted authorization to a state regulatory apparatus comprised of the State Water Resources Control Board and several subsidiary Regional Water Quality Control Boards to issue NPDES permits. The entity responsible for issuing NPDES permits, including municipal stormwater permits, and otherwise regulating discharges in the region at issue in this Notice is the Regional Water Quality Control Board, North Coast Region ("RWQCB").

The CWA requires that any notice regarding an alleged violation of an effluent standard or limitation, or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the following:

1. *The specific standard, limitation, or order alleged to have been violated.*

To comply with this requirement River Watch has identified violations of the Discharger's Stormwater Pollution Prevention Plan ("SWPPP") and violations of the *State Water Resources Control Board (State Water Board) Water Quality Order No. 97-03-DWQ National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000001* ("General Permit") in violation of the NPDES permit requirements for industrial stormwater discharges, CWA §402(p), 33 U.S.C. §1342(p).

2. *The activity alleged to constitute a violation.*

River Watch has set forth narratives below describing the violations of the Discharger's SWPPP and the General Permit, describing with particularity specific incidents referenced in the RWQCB's public documents available to the Discharger, and incorporates by reference records cited below from which descriptions of specific incidents were obtained.

3. *The person or persons responsible for the alleged violation.*

The person or persons responsible for the alleged violations identified in this Notice is Blommer Chocolate Company and those of its employees responsible for compliance with its SWPPP.

4. *The location of the alleged violation.*

The location of the various violations are identified in records created and/or maintained by the Discharger and the RWQCB which relate to the Discharger's SWPPP as further described in this Notice and take place at the Discharger's Pacific Street site in Union City, California.

5. *The date or dates of violation or a reasonable range of dates during which the alleged violations occurred.*

River Watch has examined records maintained by the RWQCB from December 20, 2007 through December 20, 2012, and will from time to time update this Notice to include all violations which occur after the range of dates currently covered. Some violations are continuous and therefore each day constitutes a violation.

6. *The full name, address, and telephone number of the person giving notice.*

The full name of the entity giving notice is Northern California River Watch, referred to in this notice as "River Watch." River Watch is a non-profit corporation dedicated to the protection and enhancement of the waters of the State of California including all rivers, creeks, streams, and groundwater in Northern California. River Watch is organized under the laws of the State of California, located at 290 S. Main Street, # 817, Sebastopol, California 95472. River Watch may be contacted via email: [US@ncriverwatch.org](mailto:US@ncriverwatch.org), or through its attorneys.

River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be addressed to:

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## **BACKGROUND**

The Discharger owns and/or operates the facility at 1515 Pacific Street in Union City, California and provides stormwater management for the site. In its capacity as an industrial discharger under CWA §402(p), the Discharger must be in possession of and operate under an industrial stormwater permit – CWA §402(p)(3)(B), 33 U.S.C. §1342(p)(3)(B).

River Watch contends the Discharger has violated the CWA and the Code of Federal Regulations by virtue of its violations of the General Permit and its SWPPP. The violations identified below are supported by the RWQCB, and evidenced by RWQCB's records with respect to the Discharger.

The General Permit prohibits the discharge of material other than stormwater not authorized by the General Permit, and discharges containing hazardous substances in stormwater in excess of reportable quantities established in the Code of Federal Regulations. The General Permit requires control of discharges containing pollutants by the use of best available technology (BAT) and best conventional pollutant control technology (BCT). The General Permit prohibits stormwater discharges that cause or contribute to a violation of an applicable water quality standard. In addition, the General Permit requires industrial dischargers to develop, implement and comply with a SWPPP, and to have a specific monitoring and reporting program in place.

As per the Clean Water Program initiated by County of Alameda (Union City website accessed on January 2, 2013,) all storm drains in Union City flow directly to its creeks, wetlands, and the Bay, and do not flow to a wastewater treatment plant. The Discharger's Pacific Street site is located less than 1,000 feet from Alameda Creek. Dry Creek, Old Alameda Creek, Ward Creek, and San Francisco Bay, all waters of the United States, are potential recipients of unauthorized discharges from the Discharger's operations at this site.

As mandated by the General Permit, development and implementation of a SWPPP is meant to emphasize best management practices (BMPs). A major goal of a SWPPP is the elimination of unauthorized non-stormwater discharges to stormwater systems. Unauthorized non-storm water discharges (even when commingled with storm water) shall be eliminated or covered under a separate NPDES Permit. A site map is required to be included with the SWPPP, showing the stormwater collection system, stormwater drainage areas, and nearby surface waters. The SWPPP must also list all significant materials handled and stored, and must describe all potential pollutant sources including industrial processes, material handling and storage areas, significant spills and leaks, and non-stormwater discharges. Additionally, the SWPPP must include one or more BMPs for each potential pollutant and its source.

The monitoring program requires facility operators to perform visual inspections of stormwater discharges and to collect and analyze stormwater discharges for pollutants which are likely to be present in stormwater discharges in significant quantities.

As per the Discharger's 2007-2008 Annual Report, stormwater was tested for copper, lead, nickel and zinc, all of which were present in the stormwater discharges sampled. However, in all later years, including the most recent, no testing for these metals was undertaken. This omission is an ongoing violation of the General Permit.

Upon visiting the Discharger's Pacific Street site in or about September of 2009, RWQCB representatives found food products (including sugar, chocolate, and food-related oils) coating the asphalt throughout the site including the storm drain inlets. In addition, forklifts operating on the site tracked these products around the site. The representatives observed no cleaning of the pavement during this site visit. Food and other potential sources of pollutants were found stored and handled in uncovered areas, potentially allowing those pollutants to reach the storm drains.

The California Toxics Rule ("CTR") establishes limits for many pollutants in California waters. The CTR limit for copper, lead, nickel, and zinc are respectively: 0.5 µg/l, 0.5 µg/l, 5 µg/l, and 10 µg/l. These metals were reported in the Discharger's 2007-2008 Annual Report as high as 930 µg/l for copper, 91.96 µg/l for lead, 472.5 µg/l for nickel, and 1,700 µg/l for zinc in stormwater discharge samples – all clearly in violation of the CTR limits.

The General Permit requires the SWPPP to be available to the regulating agency and the public. River Watch contends the Discharger's SWPPP is neither available on the Blommer Chocolate website nor at the RWQCB. At the time of the September, 2009 site visit by the RWQCB, the SWPPP could not be located.

The General Permit and RWQCB regulations also require Annual Reports to be timely submitted. River Watch contends the Discharger's 2010-2011 Annual Report was submitted only after the RWQCB had filed a notice of violation (NOV) against the Discharger.

## **VIOLATIONS**

### **A. Unauthorized Stormwater Discharges**

1. Section B of the General Permit prohibits the discharge of stormwater containing a hazardous substance equal to or in excess of a reportable quantity which in California is determined under the CTR. (General Permit Section B(2), p. 4.) In addition, facilities "must reduce or prevent pollutants" through the implementation of "BAT for toxic and non-conventional pollutants" including the use of BMPs that achieve BAT/BCT.

(General Permit Section B(3), p. 4.) River Watch alleges that from December 20, 2007 through December 20, 2012 there have been intermittent discharges of copper, lead, nickel, and zinc from the Discharger's operations at the Pacific Street site at concentrations exceeding CTR limits, in violation of General Permit Sections B(2) and B(3).

2. Section C of the General Permit prohibits stormwater discharges that "cause or contribute to an exceedance of any applicable water quality standards contained in the Statewide Water Quality Control Plan or the applicable Regional Water Board's Basin Plan." (General Permit Section C(2), p. 4.) The levels of copper, lead, nickel, and zinc found in the 2007-2008 stormwater sampling of the Discharger's operational site at Pacific Street exceed the CTR levels and therefore contribute to the exceedance of a water quality standard.

#### **B. Failure to Monitor and Report Pollutants**

Section B of the General Permit SWPPP requirements require a facility to monitor for "toxic chemicals and other pollutants that are likely to be present in stormwater discharges in significant quantities." (General Permit SWPPP Requirements, Section B(5)(c)(2).) Stormwater samples identified in the Discharger's 2007-2008 Annual Report demonstrate quantities of copper, lead, nickel, and zinc exceeding the CTR limits. In subsequent years there was no testing performed to analyze the levels of these metals in stormwater samples, violating the requirements of the General Permit. River Watch alleges this violation is continuing.

#### **C. Unauthorized Non-Stormwater Discharges - Food-Related Substances**

Section A of the General Permit prohibits the direct or indirect discharge of materials other than stormwater into a water of the United States. "Prohibited non-storm water discharges must either be eliminated or permitted by a separate NPDES permit." (General Permit, Section A(1), p. 3.) While inspecting the Dischargers's operational site at Pacific Street in September of 2009, the RWQCB found sugar, cocoa products, and other food-related substances in the storm drains. The RWQCB representative saw no indication that the surface areas were kept clean to prevent unauthorized discharges into the storm drain. In addition, not all food storage areas were paved and covered leading to the possibility of unauthorized stormwater discharges. The prohibition against unauthorized non-storm water discharges includes non-storm water discharges commingled with storm water. River Watch contends the Discharger's failure to prevent residual food products from reaching the storm drains resulted in unauthorized non-storm water discharges into waters of the United States including Dry Creek, Old Alameda Creek, Ward Creek, and San Francisco Bay; and, that this violation of the General Permit is continuing.



**D. Unavailability of SWPPP to the Agency or the Public**

A copy of the SWPPP must be made available for representatives of the RWQCB or a similar lead agency. (General Permit SWPPP Requirements, Section A(10)(a), p. 22.) In addition, the SWPPP is to be provided upon request to the RWQCB and made available to the public. (General Permit SWPPP Requirements, Section A(10)(f).) While visiting the Discharger's Pacific Street site in September of 2009, the RWQCB representative requested but did not receive a copy of the SWPPP. River Watch alleges also that the Discharger's SWPPP cannot be found on the RWQCB site. This violation of the General Permit is continuing.

**E. Failure to Timely Submit Annual Report**

A comprehensive site compliance evaluation must be timely submitted which assesses the current BMPS, lists all potential pollutant sources, contains a site map, and includes a list of any violations that occurred in the previous year. (General Permit SWPPP Requirements, Section A(9), p. 21.) River Watch contends the Discharger's 2010-2011 Annual Report was submitted only after receipt of a NOV from the RWQCB, and was almost five months late.

**REMEDIAL MEASURES REQUESTED**

1. Updating of the Discharger's SWPPP to include new BMPS that would eliminate the discharge of metals in excess of CTR limits and the unauthorized discharge of non-stormwater discharges from the Pacific Street site. The SWPPP should also include a site map clearly showing the layout of the site. The SWPPP is to be posted on either the Discharger's website and/or the RWQCB website.
2. Sampling and testing for all potential pollutants on the Pacific Street site including copper, lead, nickel, and zinc.
3. Implementation of BMPs to prevent the discharge of copper, lead, nickel, and zinc exceeding CTR limits.
4. Implementation of policies and procedures for the maintenance of the Discharger's Pacific Street operational facility and equipment to assist in the prevention of the discharge of pollutants from the site including residues from food production.
5. Establishment of annual staff training for all staff that may have involvement with the Discharger's SWPPP, facilities, and equipment at the Pacific Street site.

## CONCLUSION

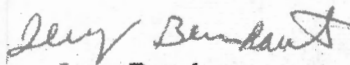
The Discharger's illegal discharges as alleged by River Watch in this Notice are a significant contribution to the degradation of Alameda Creek and tributary waters such as Dry Creek and Ward Creek, and the receiving water of San Francisco Bay, with serious adverse effects on the beneficial uses of these waters. River Watch members residing in the area have a vital interest in bringing the Discharger's operation of its facility into compliance with the CWA. River Watch alleges that without the implementation of the relief requested above the Discharger's violations and their adverse effects will continue into the future.

The violations as set forth in this Notice effect the health and enjoyment of members of River Watch who reside and recreate in the affected community. The members of River Watch use the affected watershed for domestic water supply, agricultural water supply, recreation, sports, fishing, swimming, shell fish harvesting, hiking, photography, nature walks and the like. The members' health, use and enjoyment of this natural resource is specifically impaired by the Discharger's violations of the CWA as identified in this Notice.

River Watch believes this Notice sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter River Watch intends to file a citizen's suit under CWA § 505(a) against the Discharger for the violations identified herein.

During the 60-day notice period, River Watch is willing to discuss effective remedies for these violations. If the Discharger wishes to pursue such discussions, it is suggested that a dialog be initiated soon so that discussions may be completed before the end of the 60-day notice period. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when that notice period ends.

Very truly yours,



Jerry Bernhaut

JB:lmh

cc: Administrator

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